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Robert N. Strassfeld

Case Western Reserve University - School of Law, [robert.strassfeld@case.edu](mailto:robert.strassfeld@case.edu)

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## SPECIAL TOPIC INTRODUCTION: MINERVA AT THE DEPARTURE GATE

Robert N. Strassfeld<sup>†</sup>

*Gonna go out to the arrivals gate at the airport,  
And sit there all day  
Watch people reuniting, public affection so exciting  
It even makes airports ok  
Watching children run with their arms outstretched  
Just to throw those arms around their grandpa's neck  
Watching lovers plant kisses  
Old men to their misses at the arrivals gate<sup>1</sup>*

### A. Flight Risk

It all begins with a cough at an airport. Of course, the cough is not the result of an allergy or a simple cold, and within a few months, twenty-six million people will die. That, at least, is the conceit of last year's medical thriller, *Contagion*.<sup>2</sup> From its very first scene, Gwyneth Paltrow's cough, the film exploits a number of the most deeply held contemporary American anxieties.<sup>3</sup> And from the first, it asserts an American belief that airports are dangerous places through which many perils may come our way.

The film, which not coincidentally opened in theaters on September 9, 2011, the weekend of the tenth anniversary of the September 11 attacks, plays on our post-September 11 anxieties. It draws, as well, on recent fears about pandemic disease, which it ties to fear of terrorism. Ultimately, the virus stands as a metaphor for all the perils of globalism, and airplanes and airports are the means of conveyance of those perils.

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<sup>†</sup> Professor of Law and Director Institute for Global Security Law and Policy, Case Western Reserve University School of Law.

<sup>1</sup> ANI DIFRANCO, *The Arrivals Gate*, on TO THE TEETH (Righteous Babe Records 1999).

<sup>2</sup> *CONTAGION* (Warner Bros. 2011).

<sup>3</sup> For a synopsis of the film's plot, see *Synopsis for Contagion*, IMDB, <http://www.imdb.com/title/tt1598778/synopsis> (last visited, Apr. 15, 2012).

Paltrow is soon enough identified as “patient zero,” the carrier of this dread new virus. Many of the film’s viewers doubtless remember that for some time in the 1980s, an Air Canada steward, Gaetan Dugas, a handsome young man with a Herculean sexual appetite, had been labeled the “patient zero” of the AIDS epidemic.<sup>4</sup> Dugas’ occupation was seen as part of his danger. It brought him to many cities where he was able to find a steady stream of willing sexual partners, thereby helping to spread the new disease rapidly. Not one to forego an opportunity to play on a matrix of contemporary anxieties, director Steven Soderbergh similarly links Paltrow to the wages of illicit or unconventional sex, and thereby to Dugas and the AIDS epidemic. She is at the airport because she had routed her return from a business trip through Chicago in order to have a tryst with a former boyfriend before returning home to her husband and family in Minneapolis.<sup>5</sup> Director Soderbergh rings a series of readily-available bells. Representatives of the Department of Homeland Security suggest to the Center for Disease Control (CDC) the possibility that the virus has been unleashed by terrorists. It turns out that it has not. The virus, we ultimately learn, came to the United States from Asia, the geographic source of many contemporary American anxieties.<sup>6</sup> Ultimately we learn that the disease crossed over to humans after the company that Paltrow was working for was engaged in a construction project in China, where its deforestation disturbed nesting bats. One bat, infected with the virus flew over a pig pen dropping a piece of banana from its mouth, which a pig happily gobbled up, thereby contracting the disease. The virus then travels from the chef who had prepared the now-slaughtered pig to Paltrow, as they posed for pictures at the restaurant where she had dined on her business trip to China. We have now hit the globalism panic trifecta: unchecked multinational capitalism, the avian flu, and the swine flu, with a suggestion of terrorism for good measure.

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<sup>4</sup> A Center for Disease Control researcher linked Dugas to at least forty of the first 248 cases of AIDS, then known as Gay-Related Immune Deficiency (GRID). RANDY SHILTS, *AND THE BAND PLAYED ON: POLITICS, PEOPLE AND THE AIDS EPIDEMIC* 146–47 (1987).

<sup>5</sup> Within days, that former boyfriend will be shown wheeled out on a stretcher infected by the encounter with Paltrow. *CONTAGION*, *supra* note 2.

<sup>6</sup> Not only do we associate the threat of terrorism most closely with the Middle East, we also ascribe a variety of other threats to East Asia. These include the SARS Coronavirus and avian flu, as well as fears of toxic adulterated drugs and consumer products and more generally of the declining prospects for the American economy vis-à-vis that of China.

The film's message is quite clear: be very afraid of globalism. And be afraid of airports. They open the doors to that scary world of threats that are coming to get us and our way of life.

Airports and civil aviation do present real dangers, however much we have exaggerated them. Al Qaeda used airplanes as weapons on September 11. The Federal Government responded by concluding that airport security was too important an issue to leave to the private sector and created the Transportation Security Administration (TSA), along with a variety of efforts to increase security within airports and on passenger planes.<sup>7</sup> As our responses to the 9/11 attacks made it much more difficult for a group of terrorists to commandeer an airplane in flight, Al Qaeda switched tactics, but kept a focus on air travel. On December 22, 2001, Richard Reid, also known as the "shoe bomber" managed to board an airplane with explosives concealed in his shoe. Fortunately, he failed in his efforts to ignite the explosives and bring down the plane.<sup>8</sup> TSA quickly responded with increased scrutiny of airline passengers' shoes, resulting in the now familiar routine of taking off one's shoes for them to be scanned on airport security lines. In the summer of 2006, attention turned to the possibility of liquids that might be powerful explosives when combined on a flight, when British authorities foiled a plot to attack several transatlantic flights in that manner.<sup>9</sup> Again, TSA responded with new restrictions.

The most recent innovation, this time from Al Qaeda in the Arabian Peninsula, has been resort to explosives that can escape detection by routine airport screening. Thus, on Christmas Day 2009, Umar Farouk Abdulmutallab, popularly known as the "underwear bomber," attempted to detonate high explosives that had been sewn into his underwear, as his flight from Amsterdam approached its destination, Detroit.<sup>10</sup> Fortunately, as in the case of Richard Reid, Abdulmutallab failed in his efforts to detonate the explosives and was arrested. The event prompted the TSA to accelerate its installation of body scanning

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<sup>7</sup> *Our History, TRANSP. SECURITY ADMIN.* <http://www.tsa.gov/research/tribute/history.shtm> (last visited Apr. 22, 2012).

<sup>8</sup> *Shoe Bomber: Tale of Another Failed Terrorist Attack*, CNN (Dec. 25, 2009), [http://articles.cnn.com/2009-12-25/justice/richard.reid.shoe.bomber\\_1\\_terror-attacks-american-airlines-flight-qaeda?\\_s=PM:CRIME](http://articles.cnn.com/2009-12-25/justice/richard.reid.shoe.bomber_1_terror-attacks-american-airlines-flight-qaeda?_s=PM:CRIME)

<sup>9</sup> Alan Cowell & Dexter Filkins, *British Authorities Say Plot to Blow Up Airlines Was Foiled*, N.Y. TIMES (Aug. 10, 2006), <http://www.nytimes.com/2006/08/10/world/europe/11terrorcnd.html>.

<sup>10</sup> Anahad O'Connor & Eric Schmitt, *U.S. Says Plane Passenger Tried to Detonate Device*, N.Y. TIMES (Dec. 26, 2009), <http://query.nytimes.com/gst/fullpage.html?res=9E01E7D61731F935A15751C1A96F9C8B63>.

devices in airports and to adopt them as the primary method of security screening. Under the current TSA approach, the primary method of security screening in an increasing number of airport security lines (eventually this will be true of all security lines in U.S. airports) relies on one of two kinds of body scanners: millimeter wave units and backscatter units. A traveler can opt out of being scanned by one of these units, but only if she or he is willing to be subjected to a fairly aggressive pat-down search by a TSA agent. In some instances, the pat-down is also used as a secondary screening method after the body scan.

### B. Health Risk

Why include this special topic in a specialty journal dedicated to health law? The implications of the TSA screening procedures for traveler health are powerful, as are the possibilities that health law can inform our approach to airport security. First, the backscatter units rely on ionizing radiation, thereby exposing the traveler, and potentially nearby TSA workers, to some additional radiation. TSA has concluded that these doses are negligible and do not pose a health threat.<sup>11</sup> Others are not convinced that the TSA study is adequate. On January 31, 2012, Maine Senator Susan Collins introduced legislation in the United States Senate to require that the TSA contract with an independent laboratory to test the safety of its backscatter scanners.<sup>12</sup>

Perhaps more important, given the relatively low level of radiation involved, are concerns about dignity, privacy, and autonomy raised by both the images produced by the body scanning technology and the invasive character of the pat down searches. Questions of patient dignity, privacy, and autonomy are familiar ones to health lawyers, and it is possible that health law has something to teach us about what level of intrusion we should be willing to tolerate in the name of security, and what methods might be available to mitigate the intrusiveness of the TSA techniques. There is more at issue, however, than some lessons that TSA might learn from health law. There are also important health consequences that may flow from the proce-

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<sup>11</sup> DEPARTMENT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, TRANSPORTATION SECURITY ADMINISTRATION'S USE OF BACKSCATTER UNITS 1 (2012), *available at* [http://www.oig.dhs.gov/assets/Mgmt/2012/OIG\\_12-38\\_Feb12.pdf](http://www.oig.dhs.gov/assets/Mgmt/2012/OIG_12-38_Feb12.pdf).

<sup>12</sup> S. 2044, 112th Cong. (2012). ("A bill to require the Under Secretary for Science and Technology in the Department of Homeland Security to contract with an independent laboratory to study the health effects of backscatter x-ray machines used at airline checkpoints operated by the Transportation Security Administration and provide improved notice to airline passengers.")

dures. One reason that our law attempts to protect bodily integrity and privacy is our recognition of the emotional harms that can follow from a loss of dignity or public embarrassment. Indeed, as I will suggest below, it is possible that these intrusions might trigger Posttraumatic Stress Disorder (PTSD) flashbacks for particularly vulnerable classes of travelers. Any assessment of the reasonableness of TSA procedures should consider these possible adverse health effects, along with possible ways to avoid them.

The contributors to this special topic issue recognize the relevance of health law to this topic in yet other ways. Professor Victoria Sutton reminds us that any balancing of privacy rights against the state's interest in protecting the civil aviation system places health concerns on both sides of the balance.<sup>13</sup> In addition to the concerns about radiation exposure and emotional well-being already referred to, public safety in the skies and on the ground below is also a health issue. In addition, she takes the discussion of the TSA's procedures in a new direction by considering whether the policy might be justified as the equivalent of the invocation of a public health emergency. Professor Gregory S. McNeal approaches the connections between health law and the TSA policy in yet another novel way.<sup>14</sup> Professor McNeal, recognizing that the European Union takes a somewhat different approach to privacy rights and health issues than does the United States, looks at the implementation of body scanners in Europe and the reaction of the European Parliament.

### C. Terrorist Toddlers and Al Qaeda Grandmas

Implementation of the TSA screening procedures has not been friction-free. To be sure, most people have adjusted to the added delay and have recalibrated their privacy expectations. Airport security lines function daily without incident at most airports, and airplanes take off and reach their destinations safely. Collectively, we are inclined to overestimate the risks of terrorism and are therefore prepared to sacrifice some level of dignity, privacy, and, indeed, freedom, for the sake of security, or at least its appearance.<sup>15</sup> Individually, we tend

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<sup>13</sup> Victoria Sutton, *Asking the Right Questions: Bodyscanners, Is Salus Populi Supreme Lex the Answer?*, 22 HEALTH MATRIX 441 (2012).

<sup>14</sup> Gregory S. McNeal, *Security Scanners in Comparative Perspective*, 22 HEALTH MATRIX 459 (2012).

<sup>15</sup> Erik Luna, *The Bin Laden Exception*, 106 NW. U. L. REV. COLLOQUY 230, 233–37 (2012); *see generally*, JOHN MUELLER, OVERBLOWN: HOW POLITICIANS AND THE TERRORISM INDUSTRY INFLATE NATIONAL SECURITY THREATS AND WHY WE BELIEVE THEM (2006).

to be risk averse and prefer to put up with a new set of travel indignities if it will make us feel more secure.<sup>16</sup>

Nevertheless, there have been several notorious instances of TSA insensitivity, clumsiness, and overreach. Similarly, there has been passenger resistance. In November 2010, a software programmer, John Tyner, became an instant internet celebrity when he refused to submit to either of the TSA screening techniques. Having opted out of the scanner, he agreed to be subjected to a pat-down, but added, "If you touch my junk, I'm going to have you arrested."<sup>17</sup> Informed that the pat-down would include his "junk," Tyner opted not to fly that day. While less inspiring than Patrick Henry's call to "Give me Liberty or Give me Death," Tyner's encounter with TSA, which he had surreptitiously filmed and posted on the internet, became a rallying cry for those fed up with the TSA.<sup>18</sup>

Instances of TSA overreach have included humiliating searches of the aged and infirmed and of disabled toddlers. Horror stories have included those of an eighty-eight year old woman who was strip-searched because TSA agents wanted a closer look at her colostomy bag,<sup>19</sup> a four-year old child who was made to remove his leg braces before walking through the checkpoint, a cancer survivor who was told to remove her prosthetic breast, and a man whose urostomy bag broke, covering him in urine during a pat-down.<sup>20</sup>

Again, it is important to emphasize that these represent a small portion of all of the interactions between TSA agents and travelers at airport security checkpoints each year. Nevertheless, these extreme instances say something about the risks to the dignity of air travelers beyond the simple invasiveness of the TSA procedures for all.<sup>21</sup>

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<sup>16</sup> This unscientific assertion is based on 20+ years of teaching torts to students. There is, however, much literature on why we misperceive risk and the consequences of those misperceptions. See, e.g. Luna, *supra* note 15, at 235–36.

<sup>17</sup> Brittany R. Stancombe, Comment, *Fed Up with Being Felt Up: The Complicated Relationship Between the Fourth Amendment and TSA's "Body Scanners" and "Pat-Downs,"* 42 CUMB. L. REV. 181, 193 (2011–12).

<sup>18</sup> See, e.g., Charles Krauthammer, *Don't Touch my Junk*, WASH. POST (Nov. 19, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/18/AR2010111804494.html>.

<sup>19</sup> "I felt like I was invaded": ANOTHER Granny Comes Forward to Say That She Was Strip-searched by TSA at JFK Airport, MAIL ONLINE (DAILY MAIL) (Dec. 5, 2011), <http://www.dailymail.co.uk/news/article-2070251/Elderly-woman-Ruth-Sherman-claims-forced-strip-TSA-Kennedy-Airport.html> (emphasis in original).

<sup>20</sup> *World's Top Ten Horrific Airport Security incidents in 2007-2010*, APPLE TRAVEL (Dec. 10, 2010), <http://www.appletravel.cn/news-10515.html>.

<sup>21</sup> For some evidence that TSA has sometimes used its procedures punitively for "difficult" passengers, see Luna, *supra* note 15 at 240–41.

### D. The Essays

We are fortunate to have two contributors who take very different approaches to the issues of health and airport security. Each, through the novelty of their approach and the questions that they ask, and the strength of their analysis makes an important contribution to the discussion of this topic.

In *Asking the Right Questions: Bodyscanner, Is Salus Populi Supreme Lex the Answer?*, Professor Victoria Sutton of Texas Tech University School of Law, identifies and analyzes the primary legal bases for challenging the TSA procedures. These include the obvious challenge on Fourth Amendment grounds that the body scanners and pat-downs represent unreasonable and unlawful searches and seizures without particularized suspicion and a warrant. They also include, however, such other challenges as those based on the non-delegation doctrine to a challenge that the scanners have not properly been approved for use under the procedures of the Food Drug and Cosmetics Act. Professor Sutton works through each of the legal bases for challenge that she identifies and concludes that the procedures are lawful. Nevertheless, she does identify one challenge that has met with partial success. In July 2011, the United States Court of Appeals for the D.C. Circuit rejected the Electronic Privacy Information Center's (EPIC's) substantive bases for its challenge to the TSA's procedures.<sup>22</sup> The court agreed, however, with EPIC's challenge to implementation of the procedures without undertaking notice-and-comment rulemaking.<sup>23</sup> Until recently, the Department of Homeland Security had not responded to the decision by commencing rulemaking.<sup>24</sup>

Professor Sutton asks whether the issue might not be reframed to think of the possibility of air disaster brought on by terrorism as a health emergency. Looking to other public health emergencies, she shows how the invocation of a Public Health Emergency by the President might serve both to shelter the TSA policies from judicial review and the rulemaking process.

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<sup>22</sup> Elec. Privacy Info. Ctr. v. U.S. Dept. of Homeland Security, 653 F.3d 1 (D.C. Cir. 2011).

<sup>23</sup> *Id.* at 4–8.

<sup>24</sup> In September 2012 the D.C. Circuit denied EPIC's motion for a writ of mandamus to require that DHS begin rulemaking within 60 days, noting the Department's promise to begin public comment by March 2013. Mickey McCarter, TSA to Begin Official Rulemaking for the Use of Whole Body Imagers in 2013, <http://www.hstoday.us/focused-topics/public-health/single-article-page/tsa-to-beginofficial-rulemaking-for-the-use-of-whole-body-imagers-in-2013/89af9f60f87cdc71ddf50527f2f93e.html>.



Professor Gregory S. McNeal of Pepperdine University School of Law looks to Europe, rather than to other areas of health law, for a fresh take on the issues. In *Security Scanners in Comparative Perspective*, he notes that the European Parliament was an early participant in the effort to increase the security of the civil aviation system. He notes further, however, that both the European Union Charter of Fundamental Rights and the European Convention of Human Rights are protective of human dignity, personal privacy, and human health. He then considers the impact of these principles on the European approach to airport security scanning and finds that, while the European Union has similarly increased its security efforts in the face of new terror strategies, it has done so in ways that are more protective of privacy and health than the TSA.

Notably, he considers a February 16, 2011 opinion of the European Economic and Social Committee and a July 6, 2011 non-binding resolution of the European Parliament. Both approved of the use of security scanners, but with strong reservations about a lack of an opt-out alternative, about the treatment of passengers who do opt-out, and about the use of machines that rely on ionizing radiation. After briefly comparing the American approach to the European, Professor McNeal suggests that improved technology may bring the Europeans and the Americans closer together as it becomes easier to be more protective of passenger privacy.

### **E. Voices Missing from the Debate**

Professor Sutton quite properly asks if we have asked the right question. In a sense, by looking beyond the boundaries of the U.S., Professor McNeal also asks us to rethink our questions. There is much wisdom in their reframing of the discussion. I want to suggest briefly yet another way that we might do just that.

Professor Sutton offers a possible means by which the TSA might avoid the need to engage in notice and comment rule making. While her analysis is outside of my scope of expertise, and I take no position on whether or not she has found a solution, hers certainly seems like a more creditable legal response than that of the TSA, which had until quite recently simply ignored the mandate of the D.C. Circuit. I would like to suggest that there is a value to rule making that militates against either ignoring the D.C. Circuit or finding a means to obviate the need to fulfill its mandate.

One of the values of notice-and-comment rulemaking, is the opportunity for those who will feel the impact of an agency decision to have their voices heard. There are, in matters of national security, any number of voices that are not heard in the clamor to build stronger

barricades against the things that we fear. I want to consider just a few of those here.

First, there is the Muslim community. On its face, any system of screening that is universally applied and removes elements of discretionary application would seem to be an attractive alternative to what often has amounted to racial profiling without any particularized basis for targeting the individual.<sup>25</sup> Nevertheless, there has been some suggestion that TSA agents are sometimes retaliatory in their application of its screening processes, and single out those who appear hostile to the procedure for less gentle treatment.<sup>26</sup> To the extent that a rule making might address differential treatment, it would be of particular value to those who have typically been singled out by law enforcement since September 11.

Additionally, some people with disabilities have had particular difficulties with airport security screening, as some of the security horror stories recounted above suggest. Here particular procedures might pose especially high impediments to travel while others might facilitate the interests of both the TSA and the traveler, depending on the nature of the disability. Once again, the rulemaking process allows for the vetting of these concerns.

People with religious sensibilities about immodesty are confronted with a Hobson's choice: violate deeply-held religious principles or forego what may be the most convenient and safe mode of transportation.<sup>27</sup> These are voices that ought to be heard in the design of a screening procedure before TSA implements a procedure that may eliminate their right to travel, a fundamental constitutional right.

Finally, there are countless past and current victims of abuse for whom the forced exposure and what they may experience as groping is freighted with powerful and painful resonances and emotions. For some who wrestle with PTSD, this can be a painful triggering experience. Even for those who are less burdened, the emotional health impacts are strongly negative. These are unheard voices. I only became aware of them through a conversation with Alaska State Representative Sharon Cissna.<sup>28</sup> Representative Cissna made headlines in

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<sup>25</sup> A recent example of this behavior has been the targeting of mosques in the New York City metropolitan area by the New York Police Department. See NEW YORK POLICE DEPARTMENT, INTELLIGENCE STRATEGY REPORT (May 15, 2006), *available at* <https://s3.amazonaws.com/s3.documentcloud.org/documents/288719/nypd-iranian-intel.pdf>.

<sup>26</sup> See Luna, *supra* note 11, at 240.

<sup>27</sup> For a discussion of this issue, see Colleen Deal, *Faith or Flight?: A Religious Dilemma*, 76 J. AIR L. & COM. 525 (2011).

<sup>28</sup> Telephone Conversation with Sharon Cissna, Alaska State Representative (Oct. 2011).

2011 when she refused a TSA pat-down and returned to Alaska from Seattle by boat in lieu of flying.<sup>29</sup> She then spearheaded a drive in the Alaska legislature and in other states to pass legislation condemning the TSA procedures. That notoriety and those efforts prompted a flood of mail to Representative Cissna. What she found most striking were the frequent accounts by victims of abuse who described the screening procedures as reliving that abuse. In our conversation she noted that the rate of abuse in Alaska was high and that the reliance on air travel was also particularly high. Even with a forum, the voices of these people might be drowned out or ignored. Without one, they are rendered inaudible.

As Professor Sutton notes, polls indicate that Americans are prepared to trade some additional inconvenience at the airport for security, even if they misperceive the threat and the degree to which they are rendered safe by the new procedures. We should not assume, however, that the costs of security are evenly distributed amongst all of us. Giving voice to those who experience the quest for safety differently may help us to get the balance right in our desire to be safe and free.

In Roman mythology Minerva was the goddess of wisdom. She had many roles, however. She was also the Goddess of medicine and of war. She was also a woman, and it may be women more than men who are affected by security procedures that are implemented without consideration of their impacts on different people. She deserves a place not only at the departure gate, but also in the open process of governing on such important matters as health and the “war on terror.” Perhaps she has some wisdom to share.

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<sup>29</sup> For news coverage, see, e.g., Dan Spindle, *Alaska State Rep. Refuses to Subject Herself to Intrusive TSA Searches*, MYFOXPHOENIX.COM (Aug. 6, 2011, 5:37 PM), <http://www.myfoxphoenix.com/dpp/news/local/tempe/cissna-tsa-08062011>.